No. 93-

93-341 In The

Supreme Court Of The United States

Supreme Court
AUG 30 1993

OCTOBER TERM, 1993

JAMES E. LAWS, JR.,

Petitioner,

v.

MARY SUE TERRY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

CAN THE COMMONWEALTH OF VIRGINIA DISCHARGE JAMES LAWS, A NON-SUPERVISORY, NON-POLICYMAKING, CLERICAL EMPLOYEE, SOLELY BECAUSE LAWS' EXERCISE OF HIS FIRST AMENDMENT RIGHT TO SERVE ON THE RICHMOND SCHOOL BOARD CREATES A POTENTIAL CONFLICT OF INTEREST, EVEN THOUGH NO ACTUAL CONFLICT EXISTS?

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PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Fourth Circuit is an unpublished per curiam opinion. Laws v. Terry, No. 92-2560 (4th Cir.

June 1, 1993). The opinion appears in Appendix A, at 1-3.

The memorandum opinions of the District Court are unpublished. The memorandum opinion of the District Court that granted Respondent Terry's motion to dismiss part of the Complaint, but denied her motion to dismiss the First Amendment claims, appears in Appendix B, at 1-13. The second and final memorandum opinion of the District Court, granting Respondent Terry's motion for summary judgment on the First Amendment claims, appears in Appendix C, at 1-14.

Jurisdiction

The Fourth Circuit issued its judgment in this action on June 1,

1993. Appendix A. This Petition is filed within ninety (90) days of June 1, 1993. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

United States Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Civil Rights Act of 1871, 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation,

custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Statement of the Case

Petitioner James E. Laws, Jr. ("Laws") is a former employee of Respondent Mary Sue Terry, Attorney General of the Commonwealth of Virginia ("Terry").[1] Laws was a Claims Representative within the Division of Debt Collection of the Office of the Attorney General, between October 15, 1986, and July 6, 1992.

Laws is not an attorney. He was a non-supervisory, non-policymaking, clerical employee of the Commonwealth of Virginia. As a Claims Representative, Laws assisted in the collection of debts that individuals

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[1]Terry resigned as Attorney General effective January 28, 1993. On January 29, 1993, the Virginia General Assembly appointed Stephen Rosenthal to fill the unexpired term.

owed to the Commonwealth of Virginia. The debts were for sums certain and Laws had no discretion to alter the amount of the debt owed.

As a Claims Representative, Laws never had any involvement with any claim or debt of any local government, or of any agency or board of any local government. Specifically, Laws never had any involvement with any claim or debt of the City of Richmond, the School Board of the City of Richmond ("School Board"), or any other school board.

Laws was able to exchange collection files with other Claims Representatives in the Office of the Attorney General, if he learned that he had a personal relationship or

other possible conflict with an individual debtor. Laws could have avoided any significant involvement with the file of any resident of the City of Richmond, without any disruption in the operation of the office.

Laws worked as a part-time teacher with the Richmond Public Schools between January, 1987 and June 8, 1992. Terry knew of, and never objected to, Laws' employment as a teacher with the Richmond Public Schools.

In 1990, an Assistant Attorney General received Terry's approval to seek a position on the School Board.[2]

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[2]The attorney, Milton Brown, did not receive the appointment and never served on the School Board.

Terry perceived no problem with this Assistant Attorney General serving on the School Board, despite the potential for conflicts of interest between the attorney's representation of the State and his School Board service.

On June 8, 1992, the City Council of the City of Richmond appointed Laws to the School Board. On June 30, 1992, Laws took the oath of office. Laws accepted a position on the School Board to speak and express his views on matters of public concern, i.e., the education of the youth of Richmond.

Laws served on the School Board, and could have continued to serve on the School Board, without missing any

work time as a public employee.

Laws continued working as a Claims Representative from his appointment on June 8, 1992, through the time he began service as a member of the School Board on June 30, 1992, until his discharge on July 6, 1992. At no time between June 8 and July 6, 1992, did there arise any conflict or problem of any kind because of Laws' membership on the School Board. There was no disruption in the operation of the office or in the performance of Laws' duties as a Claims Representative. Indeed, before discharging Laws, Terry stated that Laws could remain employed as a Claims Representative through the Summer while a member of the School Board, i

he agreed to resign his employment at the end of the Summer. Laws would not agree to leave his employment voluntarily or relinquish his School Board position.

Apart from discharge, Laws was willing to accept any restriction, rule, or order reasonably designed to avoid and prevent any conflict of interest. Laws also was willing to accept any restriction, rule, or order necessary to ensure an immediate end to any actual conflict that arose. Terry, however, never attempted any lesser restriction on Laws' School Board service than discharge from his public employment.

Terry discharged Laws on July 6, 1992, solely because of his membership on the School Board.

In his Complaint, inter alia, Laws alleged that his discharge violated the Civil Rights Act of 1871, 42 U.S.C. § 1983, because the discharge violated his First Amendment rights of free speech and association. The District Court had jurisdiction of the action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a).

With regard to Laws' First Amendment claims, the District Court entered summary judgment in favor of Terry, finding no material facts in dispute. Memorandum Opinion, Appendix C. First holding that Laws' service on the School Board was protected by the

First Amendment, the District Court stated the issue as follows:

> whether [Laws'] right to accept his appointment on the School Board is outweighed by a legitimate state interest.

Appendix C, at 7-8. The District Court held that the avoidance of "potential divided loyalties as well as unavoidable appearances of impropriety" were legitimate state interests that outweighed Laws' First Amendment rights. Appendix C, at 12.

The District Court specifically held that the **potential** conflict created by Laws' School Board service was a sufficient state interest to justify the denial of Laws' First Amendment rights of speech and association, even though no **actual**

conflict existed at the time of discharge. See Appendix C, at 12-13.

Laws appealed the decision of the District Court to the Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed in a brief per curiam decision that adopted the opinion of the District Court without discussion. Appendix A.

Pursuant to 28 U.S.C. § 1254(1), Laws now petitions this Court for a writ of certiorari to review the holding of the Fourth Circuit and District Court.

Reasons for Allowance of Writ

This Court should review this case because the decision of the lower courts conflicts with applicable decisions of this Court and seriously

weakens the right of public employees to engage in activity protected under the First Amendment.

This Court has repeatedly held that:

> It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech.

Rankin v. McPherson, 483 U.S. 378, 383, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); accord Connick v. Myers, 461 U.S. 138, 142, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

When a public employer seeks to deny a public employee the right to engage in protected speech,

expression, or association, this Court balances

> the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees.

Rankin v. McPherson, 483 U.S. 378, 384, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987), quoting Pickering v. Board of Education, 391 U.S. 563, 568 (1968).

In this case, there is no legitimate state interest that justifies the denial of Laws' First Amendment right to serve on the School Board, because the only asserted state interest is the avoidance of a

possible, potential harm. In other words, when applying the balancing test set forth in the precedents of this Court, the lower courts balanced the interest of the public employee in exercising his First Amendment rights against a **potential** harm to the public employer. This approach eviscerates the principles set forth in Rankin v. McPherson, supra, and Connick v. Myers, supra.

Public employers will always be able to construct scenarios in which harm results from a public employee's exercise of his or her First Amendment rights. The State's ability to posit such theoretically possible harm should not enable to State to deny a public employee the exercise of his or

her First Amendment rights. This Court should take this opportunity to correct the mistake of the lower courts and clearly hold that an employee's First Amendment rights of speech and association may not be infringed because of a possible or potential conflict of interest. A conflict of interest, or other harm to the efficient and proper operation of the public employer, must be actual and existing in order to justify a denial of First Amendment rights.

For example, this Court has held that the discharges of non-supervisory, non-policymaking public employees such as Laws, because of a potential conflict between an employee's political affiliation and

his or her public employment, are unconstitutional. See Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990); Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

The public employer must balance her right to operate her office without disruption and the employee's right to exercise his rights of free speech, expression, and association. Implicit in this balancing are the requirements that the employee's exercise of a constitutional right must threaten a legitimate governmental interest and that the public employer may restrict the

constitutionally protected conduct only as reasonably necessary to further the legitimate governmental interest. If the restriction is not necessary to further any legitimate interest, then no balancing is necessary to determine that the employee's interests are paramount. An unnecessary restriction cannot outweigh a constitutional right of free speech, expression, or association.

Terry made no effort to limit her restriction on Laws' First Amendment rights to a restriction that was necessary to protect a legitimate interest of her Office. Any number of orders could have been given to prevent legitimate concerns, including

the occurrence of any conflict of interest. If any such orders could not have been followed, then the question of resignation or discharge properly could have been considered. It never reached that point; Terry simply discharged Laws on the basis of a possible, future harm resulting from Laws' School Board service. Such a discharge of a public employee was unnecessary to the operation of the Office of the Attorney General and thus, unconstitutional.

Conclusion

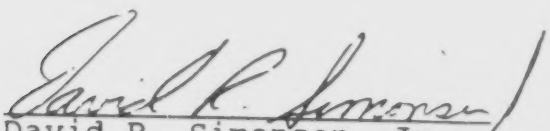
For the reasons stated in this Petition, Laws asks that this Court grant his Petition, issue a writ of certiorari, and review the judgment of the United States Court of Appeals for

the Fourth Circuit.

Laws also asks for such other and further relief as is proper.

Dated this 30th day of August, 1993.

Respectfully submitted,



David R. Simonsen, Jr.
COUNSEL FOR PETITIONER

Certificate Of Service

I do hereby certify that I have this 30th day of August, 1993, filed 40 copies of the foregoing Petition for Writ of Certiorari with the Clerk's Office of the Supreme Court of the United States and have mailed the required three (3) copies to opposing counsel:

The Honorable Stephen D. Rosenthal
Attorney General of the Commonwealth of Virginia
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

The necessary filing and mailing was performed in accordance with instructions by counsel on the case.

Barbara E. Grove
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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

James E. Laws, Jr.,
Plaintiff-Appellant,

v. No. 92-2560

Mary Sue Terry, Attorney General
of the Commonwealth of Virginia,
Defendant-Appellee.

Appeal from the United States
District Court for the Eastern
District
of Virginia, at Richmond
Robert R. Merhige, Jr.,
Senior District Judge

Argued: May 5, 1993

Decided: June 1, 1993

Before RUSSELL and HAMILTON, Circuit Judges, and HEANEY, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: David R. Simonsen, Jr., Richmond, Virginia, for Appellant. Paul Joseph Forch, Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee. **ON BRIEF:** Stephen D. Rosenthal, Attorney General, Neil A.G. McPhie, Senior Assistant Attorney General, Guy W. Horsley, Jr., Senior Assistant Attorney General, R. Claire Guthrie, Chief Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee

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Unpublished opinions are not binding precedent in the circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Plaintiff James E. Laws, a former employee in the Virginia Attorney General's Office, appeals the district court's dismissal under Fed. R.Civ.P. 12(b)(6) of his Section 1983 claim that his firing violated the Equal Protection Clause and the district court's grant of summary judgment for

the Attorney General on his Section 1983 claim that his firing violated the First Amendment.

We have reviewed the issues, studied the briefs and the record, and heard oral argument. We agree with the analysis of the district court and affirm on the basis of its reasoning.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

JAMES E. LAWS, JR.,

Plaintiff,

v. CA No.3:92CV547

MARY SUE TERRY,

Defendant.

MEMORANDUM

This matter is before the Court on the Defendant's motion to dismiss under Rule 12 (b)(6) F.R.C.P. The Plaintiff is a former employee of the Office of the Attorney General for the Commonwealth of Virginia, and he is suing the Attorney General in her official and individual capacities for an alleged violation of 42 U.S.C. § 1983.

The facts in this matter are not in dispute. The Plaintiff, James E. Laws, Jr., was employed as a Claims Representative by the Office of the Attorney General ("OAG") from October 15, 1986 to July 6, 1992. On June 8, 1992, the City Council of the City of Richmond appointed the Plaintiff to the School Board for the Richmond City Schools. The defendant, the Attorney General of the Commonwealth of Virginia and the Chief executive of the Department of Laws and the OAG, informed the Plaintiff that he must either decline the appointment to the School Board or leave his position with the OAG.

The Defendant accepted the position on the School Board and was

sworn in as a member on June 30, 1992. On July 2, 1992, the Defendant gave the Plaintiff the option to resign from his position on the School Board or resign from his position with the OAG. The Defendant refused to exercise either option. On July 6, 1992, the Defendant discharged the Plaintiff from employment with the OAG for his failure to resign from the School Board.

The Plaintiff's section 1983 claim alleges two constitutional violations. The Plaintiff claims that the Attorney General's restriction on his ability to serve on the School Board while employed with the OAG violated his First Amendment rights to free speech, expression and

association. The Plaintiff also claims that since other employees of the OAG maintained outside employment and memberships on various private and public boards, including his own employment as a substitute teacher, his discharge for school board service was a violation of the Equal Protection Clause.

The Defendant's motion to dismiss challenges the two constitutional claims, and in the alternative, asserts the defense of "good faith" qualified immunity. Thus, the Court deems the following issues must be considered in ruling on the instant motions:

1.) Whether the Plaintiff's service on the Richmond City School

board is a protected form of speech or association under the First Amendment;

2.) Whether the OAG's policy to prohibit duel employment by the School Board and the OAG is supported by a rational basis; and

3.) Whether the challenged conduct by the Attorney General violated a clearly established right of the Plaintiff in a manner that a reasonable person would have known.

The Plaintiff cites the proposition that the OAG can not condition employment on a basis that infringes a constitutionally protected right. Connick v. Meyers, 461 U.S. 138 (1983). This assertion is true and advances the ultimate issue of whether service on the school board is

a constitutionally protected form of expression. The Plaintiff contends that his position on the school board is his vehicle for the expression and advancement of his opinions on public education. The Plaintiff argues that different people may choose different methods of expressing their views on public education; some may write letters to the Editor, some may speak to the City Council, and some may choose to speak to the city by serving on the school board.

The Defendant claims that school board service is not protected speech, regardless of whether it was the Plaintiff's chosen vehicle of expression. The Defendant notes that school board service might amplify his

voice in the policy making process, but the Plaintiff has no right to hold public office as the chosen means to his expressive ends. Minnesota Board of Community Colleges v. Knight, 465 U.S. 271 (1984). The Defendant maintains that the OAG has content neutral positions on duel employment. The prohibition against duel employment has the legitimate basis of avoiding potential conflicts of interests or loyalties created by employment with two public entities.

Both parties support their First Amendment argument with a different set of analogies. The Plaintiff uses a line of cases that attaches constitutional protection to the right of a individual to choose their

associations. Connick v. Myers, 461 U.S. 138 (1983); Hatcher v. Board of Education, 809 F.2d 1546 (11th Cir. 1987); Clark v. Library of Congress, 750 f.2d 89 (D.C. Cir. 1984). The Defendant uses a line of cases holding there is no constitutional right to simultaneously hold two public positions. Clements v. Fashing, 457 U.S. 957 (1982); Joyner v. Mofford, 706 F.2d 1523 (9th Cir. 1983). While both of these propositions are true, and both provide legitimate analogies, neither is closer to being directly on point than the other. There is support for arguments, and a difficult decision on the First Amendment issue eventually will have to be made.

The next issue to consider is whether the Plaintiff's discharge violated his Equal Protection rights. The Plaintiff claims that since other employees of the OAG are allowed to perform other forms of public and private service, the Defendant's prohibition of his service on the school board deprived him of equal protection. The weakness in this claim is the extremely low standard of review for this Court. In reviewing Equal Protection claims where there is no suspect class or fundamental right the policy should be sustained unless the Court can conceive of no rational basis for it. The trial court is not even required to determine the explicit purpose of the challenged

act. It is sufficient that the trial court could conceive of any set of facts supporting the reasonableness of the policy. Walsh v. Commonwealth of Massachusetts, 618 F.2d 156, 159 (1st Cir. 1980). The potential conflict of interests is one of many possible rational bases.

The final issue for consideration is whether the Defendant is entitled to a "good faith" qualified immunity from either or both of the above alleged violations. In addition to injunctive relief, the Plaintiff seeks compensatory and punitive damages against Terry totalling $500,000. Governmental officials sued for damages attributable to alleged constitutional violations are entitled

to the defense of qualified "good faith" immunity if their challenged conduct does not violate a clearly established right in a manner that a reasonable person would have known. Davis v. Scherer, 468 U.S. 183 (1984). The Fourth Circuit's most recent decision in this area furthers this proposition and holds that officials are not liable for bad guesses in gray areas and that the manner in which the right applies must be apparent. Maciariello v. Summer, ___F.2d, 1992_____, U.S. App. LEXIS 19160 (4th Cir. Aug. 18, 1992).

Even in a light most favorable to the Plaintiff, the two alleged violations occur in "gray areas" of the law. For this reason, the

Defendant should be allowed a qualified immunity defense from damages. The remaining question then becomes whether the Plaintiff has stated a claim for which injunctive relief can be granted on either of the two constitutional claims.

The Equal Protection claims seems meritless. All the Court has to do is to conceive of a possible rational basis for the OAG's policy. The Court's reference to a potential conflict of interest is sufficient. The First Amendment claim is a different story. A valid argument can be made on both sides of the issue.

Since the potential violation of the Plaintiff's First Amendment right is uncertain, it would be improper to

dismiss the complaint as insufficient. It may be appropriate for summary judgment at a later date, however, the Plaintiff should be allowed to proceed with his section 1983 claim for injunctive relief based on an alleged violation of his First Amendment rights.

An appropriate Order shall follow.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

28 OCT 1992
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

JAMES E. LAWS, JR.,

Plaintiff,

v. CA No.3:92CV547

MARY SUE TERRY,

Defendant.

MEMORANDUM

This matter is before the Court on the Defendant's motion for summary judgment under Rule 56(b) Fed. R. Civ. P. The Plaintiff is a former employee of the Office of the Attorney General for the Commonwealth of Virginia, and he is suing the Attorney General in her official capacity.

The Plaintiff, James E. Laws, Jr., was employed as a Claims Representative by the Office of the

Attorney General ("OAG") from October 15, 1986 to July 6, 1992. On June 8, 1992, the City Council of the City of Richmond appointed the Plaintiff to the School Board for the Richmond City Schools. The Defendant, the Attorney General for the Commonwealth of Virginia and the Chief executive officer of the Department of Laws and the OAG, informed the Plaintiff that he must either decline the appointment to the School Board of leave his position with the OAG.

The Plaintiff accepted the position on the School Board and took his oath as a member on June 30, 1992. On July 2, 1992, the Defendant gave the Plaintiff the option to resign from his position on the School Board

or to resign from his position with the OAG. The Defendant refused to exercise either option. On July 6, 1992, the Defendant discharged the Plaintiff from employment with the OAG for his failure to resign from the School Board.

The Plaintiff's complaint alleged a violation of 42 U.S.C. § 1983 as well as two constitutional violations. The Plaintiff claimed that the Attorney General's restriction on his ability to serve on the School Board while employed with the OAG violated his First Amendment rights to free speech, expression, and association. The Plaintiff also claimed that since other employees of the OAG maintained outside employment

and membership on various private and public boards, including his own employment as a substitute teacher, his discharge for school board service was a violation of the Equal Protection clause.

Pursuant to the Defendant's motion to dismiss, this Court entered an Order on October 28, 1992 dismissing the Plaintiff's Equal Protection claim and granting the Defendant qualified, "good faith" immunity on the First Amendment claim. The only remaining issue before the Court on the Defendant's motion for summary judgment is whether the First Amendment offers the Plaintiff sufficient protection to potentially award injunctive relief.

Federal Rule of Civil Procedure 56 governs motion for summary judgment. Pursuant to Rule 56, summary judgment is appropriate only where parties do not dispute material facts that might affect the outcome of an action. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To defeat summary judgment, a nonmoving party, who will bear the burden of proof at trial on a dispositive issue, must go beyond his or her pleadings with affidavits, depositions, interrogatories or other admissible evidence to show specific facts that amount to a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1985). Where the parties show no dispute on material

fact, summary judgment is appropriate.

The Court is always mindful of the importance of the First Amendment in our Democratic society. Since the Bill of Rights was ratified in 1791, free speech has been considered one of the most fundamental of all personal liberties and a condition precedent to nearly every other form of freedom. Palko v. Connecticut, 302 U.S. 319 (1937). For this reason, this Court proceeds with great caution when it must consider the parameters and limits of the First Amendment.

The Defendant's First argument in her motion for summary judgment is that the Plaintiff's position on the School Board is not expressive and does not constitute "speech" as

protected under the First Amendment. The Defendant cites a line of cases defining the parameters of non-verbal, expressive conduct. Texas v. Johnson, 491 U.S. 397 (1989); United States v. O'Brien, 391 U.S. 367 (1968); Dennison v. County of Frederick, 921 F.2d 50 (4th Cir. 1990). The Court is not persuaded by this argument and finds that the Defendant, if not actually restricting the Plaintiff's speech, has at least restricted his forum. The Court further finds, however, that this restriction imposed by the Defendant is content-neutral.

The final question for the Court, and really the issue for summary judgment, is whether the Plaintiff's right to accept his appointment on the

School Board is outweighed by a legitimate state interest. This is an appropriate issue for the Court on summary judgment because the application of First Amendment principles to the facts in this case requires the Court "to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles." ACORN v. City of Phoenix, 798 F.2d 1260, 1263 (9th Cir. 1986).

The Defendant points to a persuasive line of cases restricting the First Amendment rights of public employees attempting to hold two public positions concurrently. Clements v. Fashing, 457 U.S. 957 (1982); Williams v. I.R.S., 919 F.2d

745 (D.C. Cir. 1990); Wilson v. Moore, 346 F. Supp. 635 (N.D. W.Va. 1972). Although this authority is persuasive, the Court does not find it dispositive. The state may advance this theory to support its contention that there is a legitimate state interest involved, however, this factor alone does not establish a legitimate state interest on the instant facts. The Court agrees with the Plaintiff that the state must show a legitimate reason for objecting to the duel employment.

The Defendant submits that the Plaintiff's position on the City School Board and his former position with the OAG were in potential conflict, both real and perceived, and

that there was a potential for perceived impropriety. Generally, the OAG is frequently required to file, in the name of the Board of Education, mandamus actions against local school boards. The Defendant cites examples of actual conflicts between local and state educators concerning such controversial areas as state funding allocations and minimum standards compliance. School Bd. v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978); Commonwealth v. Arlingto[n] County Bd., 217 Va. 558, 232 S.E.2d 30 (1977).

As a Claims Representative for the OAG, the Plaintiff was responsible for managing and attempting to collect thousands of outstanding debts,

primarily in the form of delinquent student loans, owed to the Commonwealth of Virginia. In this capacity, the Plaintiff understandably had much contact with the public as a representative of the OAG. As a Claims Representative, the Plaintiff was given the discretion to determine repayment procedures and approve repayment schedules. Among the thousands of claims, the Plaintiff would inevitably have to collect from local constituents of the school board. The Defendant offered an undisputed affidavit that showed approximately ten percent of the Plaintiff's current files involved Richmond City residents. In this capacity, the argument that the

Plaintiff would face potential divided loyalties as well as unavoidable appearances of impropriety is well taken, regardless of how well he exercised his discretion. There is, the Court's view, a legitimate state interest in avoiding this type of conflict, both real and perceived.

The Plaintiff argues that if the Court accepts the argument that a potential for conflict is sufficient to constitute a legitimate state interest, than the state can conceive of a potential conflict with almost every civic or religious organization. Although the term "potential" does allow an academic argument to stretch its limits to extremes, the Court must objectively compare "potential"

conflict and "legitimate" state interest. Certainly every potential conflict will not constitute a legitimate state interest. See, CSC v. Letter Carriers, 413 U.S. 548 (1973) (upholding Hatch Act prohibiting partisan political activity by federal employees).

The Plaintiff's right to association claims must withstand similar analysis as his free speech claim, and therefore, must also fail. The Commonwealth has a legitimate interest in preserving the objectivity and loyalty of its employees, both real and perceived.

An appropriate Order shall follow.

/s/Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

7 DEC 1992
Date

No. 93-341

In The

Supreme Court of the United States

October Term, 1993

JAMES E. LAWS, JR.,

Petitioner,

v.

MARY SUE TERRY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE EVIDENCE ESTABLISHES PETITIONER'S INABILITY TO PROPERLY PERFORM TWO PUBLIC JOBS SIMULTANEOUSLY WITHOUT THE APPEARANCE OF IMPROPRIETY OR DIVIDED LOYALTY.

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No. 93-341

In The

Supreme Court of the United States

October Term, 1993

JAMES E. LAWS, JR.,

Petitioner,

v.

MARY SUE TERRY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Respondent, Mary Sue Terry ("Terry"), respectfully sets forth the following pertinent facts to correct and clarify Petitioner's ("Laws") statement.

As a Claims Representative in the Office of the Attorney General ("OAG"), Laws was responsible for collecting outstanding debts from local residents and citizens of the Commonwealth, primarily in the form of delinquent student loans owed the Commonwealth of Virginia. (App. C at 10-11.) While Laws had no authority to forgive or waive indebtedness, he had substantial discretion in

negotiating directly with individual debtors, assessing financial *capacity to repay, determining repayment* amounts and schedules, and monitoring debtor compliance with repayment plans. (App. C at 11; R. at 13-14, 38-43, 54-55.)[1]

The district court found that Laws "understandably had much contact with the public as a representative of the OAG." (App. C at 11.) The district court further found that "[a]mong the thousands of claims, [Laws] would inevitably have to collect from local constituents of the [Richmond] school board." (App. C at 11.) Laws' deposition testimony also conceded the impracticability of removing him from collection responsibility for constituents of the Richmond School Board. In addition to heavy caseloads and limited collections staffing in the OAG, Laws acknowledged:

> Q. Mr. Laws, how would you know, with your voluminous accounts of 1389 cases, to what extent you were dealing with individuals who were employed by the city schools or who were employed by city government or who were residents of the city?
>
> A. You really would not know just looking at the accounts. Once you get into issues, garnishments and researching issues of employment, that information comes about. You would be along in that process before

---

[1] "App." refers to the Appendix contained in the Petition and "R." refers to the Record of Proceedings before the Court of Appeals.

> you would know you were dealing with a person that had a connection.

(R. at 46.)

Laws did not previously inform his immediate supervisor or Attorney General Terry of his appointment to the Richmond School Board ("School Board"). (R. at 17-18, 49, 56.) After learning of the appointment, Terry gave Laws the opportunity to work for the OAG or the Richmond School Board, but not both positions simultaneously. (App. B at 3.) Following Laws' refusal to resign either position, Terry terminated Laws' employment with the OAG. (App. B at 3.) Terry's reasons are set out in her affidavit, as well as in her letter of July 23, 1992 to Laws which states, in pertinent part:

> This Office is required by law to opine officially on the legality of policies adopted by local government, including its School Boards. Such opinions are recognized as authoritative by the Virginia Supreme Court and regularly requested by public representatives in shaping public policy. This Office is further required to enforce State policy at the local level. For example, and specifically to the operations of our public school system, State law imposes a duty on the Attorney General to institute mandamus against any School Board that has failed or refused, and continues to fail or refuse, to comply with the State mandated standards of quality.
>
> Recent litigation with the Richmond School Board in the *Bradley* case, as well as the potential for intervention in the pending school funding case brought by several School Boards against the Commonwealth, illustrate the posture of

> adversariness that can and does exist between local and state policymakers.
>
> Our judgments, communications with clients and the public, collections and enforcement actions, and defenses of State policy must be free from any appearance of conflict or impropriety and beyond local perceptions of political influences. Our clients are also entitled to expect that their communications to us, and internal legal analyses, are absolutely privileged to them and free of any appearance of improper influence. In addition, School Board service is a substantial, on-going responsibility involving more than periodic board meetings. It entails daily communication with and advocacy for local constituents and supervision of the public school system in all its myriad operations. Creating potential for public misapprehension as to the role of this Office in local issues is contrary to the best interest of this Office.

(R. at 50; Ex. 11 to Terry Aff. in the Motion for Summary Judgment filed on November 10, 1992 in the district court.)

The district court found that Terry's decision was "content-neutral." (App. C at 7.) Even Laws conceded the absence of content-based motive. (R. at 44, 45.) The district court further found that Laws, in performing his collections job in the OAG and his job with the Richmond School Board, would face "divided loyalties as well as unavoidable appearance of impropriety . . . regardless of how well he exercised his discretion." (App. C at 12.)

In granting summary judgment for Terry, the district court stated that the "Commonwealth has a legitimate

interest in preserving the objectivity and loyalty of its employees, both real and perceived." (App. C at 13.) The United States Court of Appeals for the Fourth Circuit affirmed by an unpublished *per curiam* opinion. (App. A at 1-3.) Laws did not petition the court of appeals for rehearing or seek review *en banc*.

SUMMARY OF REASONS FOR DENYING WRIT

No important federal question is presented. The holding below turns on the facts and duties of two specific job responsibilities, and is not in conflict with any decision of this Court or that of any other United States Court of Appeals.

ARGUMENT

I. THE PETITION SEEKS REVIEW OF ADVERSE FACTUAL FINDINGS MADE BY THE DISTRICT COURT AND UPHELD BY THE COURT OF APPEALS

At base, this case presents a garden-variety disagreement with an employer's content-neutral discretion over management of the workplace and an appeal to this Court to reweigh the evidence considered below. Laws asserts on brief that his termination was unnecessary. He argues that Terry could have ordered other alternatives rather than discharging him. Laws offered no evidence on this point and consequently the record is devoid of any explanation of possible alternatives. In fact, Laws' argument below suggested he was unwilling to refrain from

activity which could create conflict. *See* Opening Ct. of App. Br. of Appellant at 14.

As a Claims Representative, Laws was duty-bound to serve the best interests of the state in zealously negotiating, monitoring and enforcing the collection of debts, including delinquent student loans involving constituents of the Richmond School Board. As a school board member, Laws would also be accountable to residents and school employees of the City of Richmond. Moreover, as Terry testified in her affidavit, the OAG could not perform beyond question its public responsibility to adjudicate, through the opinion process, the statutory powers of local school boards, as well as represent the state agency responsible for enforcing the Richmond School Board's compliance with state edicts. *See* Terry Aff. in the Motion for Summary Judgment filed on November 10, 1992 in the district court. After examining the functions of the two specific public jobs involved in this case, the district court found, as a matter of fact, that appearance of impropriety would be "unavoidable" and Laws could not properly perform both positions simultaneously without potential for conflict. (App. C at 12.)

It is well established that this Court will not reweigh evidence. *See United States v. Johnston*, 268 U.S. 220, 227 (1925); *Southern Power Co. v. North Carolina Pub. Serv. Co.*, 263 U.S. 508 (1924); *Houston Oil Co. v. Goodrich*, 245 U.S. 440 (1918). This is particularly appropriate where, as here, two courts, the court of appeals and the district court, unanimously rejected Laws' factual assertions. *See Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 318 n.5 (1985); *United States v. Doe*, 465 U.S. 605, 614 (1984); and *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975).

This record also provides no basis for withholding from Terry, as Laws' employer, a presumption of correctness and fairness of official action. *See, e.g., Bishop v. Wood*, 426 U.S. 341, 350 (1976) (In the absence of unconstitutional motives, official action is presumed "regular and, if erroneous, can best be corrected in other ways."); *Withrow v. Larkin*, 421 U.S. 35, 55 (1975) ("Without a showing to the contrary, state administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.' ") Terry's judgment in this case, as set out in her letter of July 23, 1992, is entitled to reasonable deference. The reasonableness of this judgment and the concern for potential conflicts and appearances of improper influence were also affirmed by the court of appeals in its appellate review. There is simply no basis upon which the Court should reweigh or reevaluate the evidence properly established below.

II. THE HOLDING BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT AND LOWER COURTS UPHOLDING CONTENT-NEUTRAL RESTRICTIONS ON PUBLIC SERVANTS SEEKING TO PERFORM SIMULTANEOUSLY TWO INCOMPATIBLE JOBS

The holding of the district court does not conflict with precedents of this Court or in the circuits.

The Court has consistently upheld content-neutral restrictions which promote integrity and public confidence in the operations of government. *See Clements v. Fashing*, 457 U.S. 957, 968 (1982); *United States Civil Serv.*

Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973); and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

> [I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.

Letter Carriers, 413 U.S. at 565.

The decisions below are to the same sensible effect. *See, e.g., Arceneaux v. Treen*, 671 F.2d 128 (5th Cir. 1982) (upholding on equal protection grounds content-neutral prohibitions on dual employment and office-holding); *Wilson v. Moore*, 346 F. Supp. 635 (N.D. W. Va. 1972) (upholding content-neutral bans on state employees also holding legislative seats); *State ex rel. Stephan v. Johnson*, 795 P.2d 411 (Kan. App. 1990), *appeal dismissed*, 807 P.2d 664 (Kan. 1991) (upholding content-neutral ban on state employee also holding office with State Board of Education); and *Williams v. IRS*, 919 F.2d 745 (D.C. Cir. 1990) (upholding content-neutral restrictions on outside employment).

Our national experience also affirms the importance of sustaining reasonable prohibitions on public officials and employees performing incompatible dual positions. *See, e.g.*, Sup. Ct. R. 7 (prohibiting law clerks and employees of the Court from employment deemed incompatible with functions of the Court.); Va. Code Ann. § 23-9.3 (prohibiting state employees from appointment to the State Council of Higher Education); Va. Code Ann. § 9-84.01:1(A) (prohibiting state employees from appointment to the Virginia Commission for the Arts); Va. Code

Ann. § 24.1-33 (prohibiting federal, state and local employees and officers from appointment to a local electoral board or registrar position); Va. Code Ann. §§ 16.1-69.19, 17-3.1 (prohibiting state court judges from holding "any other office of public trust"). In performance of the public trust, the legitimate interest at stake is the avoidance of improper appearances and potential conflict.

The evidence of record supports the district court's finding that Terry's decision was content-neutral, and designed to avoid improper appearances of conflict and to promote public confidence in the operations of a public law office. This factual finding distinguishes the case at bar from the content-based citations contained in Laws' Petition. This record is devoid of any evidence of censorship of ideas or viewpoints triggering First Amendment analysis, much less hostility to expressive conduct communicating a particularized message. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989).

CONCLUSION

The district court's conclusion that Laws could not properly perform simultaneously both as a Claims Representative and Richmond School Board member is a factual finding amply supported by the record. Moreover, there is no conflict among the circuits on any pertinent legal issue. Finally the decision of the district court and the court of appeals is not in conflict with any decision of

this Court. The Petition for Certiorari should, therefore, be denied.

Respectfully submitted,

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